Supreme Court, U.S.
FILED
AUG 30 2001
OFFICE OF THE CLERK

No. 01-14

IN THE

Supreme Court of the United States

MUCKLESHOOT INDIAN TRIBE,
Petitioner,

v.

PUYALLUP INDIAN TRIBE, *et al*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF THE PUYALLUP TRIBE, THE SUQUAMISH TRIBE, THE SWINOMISH INDIAN TRIBAL COMMUNITY, AND THE TULALIP TRIBES

ANNETTE M. KLAPSTEIN
PUYALLUP INDIAN TRIBE
2002 East 28th Street
Tacoma, Washington 98404
(253) 573-7877

HARRY R. SACHSE *
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY
1250 Eye Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 682-0240

* Counsel of Record

Attorneys for the Puyallup Indian Tribe

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

MICHELLE HANSEN
SCOTT WHEAT
P.O. Box 498
Suquamish, WA 98392
(360) 598-6295

Attorneys for the Suquamish Indian Tribe

ALIX FOSTER
P.O. Box 817
LaConner, WA 98501
(360) 466-3163

Attorney for Swinomish Indian Tribal Community

MASON D. MORISSET
801 Second Avenue
Suite 1115
Seattle, WA 98104-1509
(206) 386-5200

Attorney for Tulalip Tribes

QUESTION PRESENTED

Whether the district court under its retained jurisdiction correctly interpreted its earlier finding of fact establishing the usual and accustomed fishing places of the Muckleshoot Tribe.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. Background Facts	1
B. Question Presented For Review	5
REASONS FOR DENYING THE PETITION	6
I. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH A DECISION OF ANOTHER UNITED STATES COURT OF APPEALS, NOR HAS IT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A DECISION OF A STATE COURT OF LAST RESORT	6
II. THE DECISION BELOW DOES NOT WARRANT THE SUPERVISORY JURISDICTION OF THIS COURT	6
A. The Phrase "and Secondarily in the Saltwater Of Puget Sound" Required Interpretation To Determine Where Muckleshoot Could Lawfully Fish	6
B. Res Judicata Does Not Bar Resolution Of Ambiguities Within A Judgment	9
III. THE COURT SHOULD NOT GRANT REVIEW FOR THE ADDITIONAL REASON THAT THE PETITIONER IS JUDICIALLY ESTOPPED FROM MAKING ITS PRINCIPAL ARGUMENT	9
CONCLUSION	12

TABLE OF AUTHORITIES

CASES — Page

Brown v. Felsen, 442 U.S. 127 (1979) 9
Julian Petroleum Corp. v. Courtney Petroleum Co., 22 F.2d 360 (9th Cir. 1927) 7
Marshall v. Andrew F. Mahony Co., 56 F.2d 74 (9th Cir. 1932) 7
Montana v. United States, 440 U.S. 544 (1981) ... 9
Muckleshoot Tribe v. Lummi Indian Nation, 234 F.3d 1099 (9th Cir. 2000) 2
Muckleshoot Tribe v. Lummi Indian Tribe, 141 F.3d 1355 (9th Cir. 1998) ..... *passim*
New Hampshire v. Maine, ___ U.S. ___, 121 S. Ct. 1808 (2001) 10, 11
O'Brien v. Miller, 168 U.S. 287 (1897) 8
United States v. Lummi Indian Tribe, 235 F.3d 443 (9th Cir. 2000) 2
United States v. Muckleshoot Indian Tribe, 235 F.3d 429 (9th Cir. 2000) 2
United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974) ..... *passim*
United States v. Washington, 459 F. Supp. 1020 (W.D. Wash. 1975) 2
United States v. Washington, 626 F. Supp. 1405 (W.D. Wash. 1981) 2
Washington v. Courville, 676 P.2d 1011 (Wash. Ct. App. 1983) 3

RULES

United States Supreme Court Rule 10 6

STATEMENT OF THE CASE

The decision for which review is sought affirmed a district court decision resolving a dispute between several tribes over the fishing boundaries set in an earlier finding of fact by the same court. The district court specifically retained jurisdiction to resolve such disputes, and has done so many times. Indeed the petitioner, the Muckleshoot Tribe, itself previously brought just such an action and obtained just such a resolution of another Tribe's fishing grounds. *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355 (9th Cir. 1998). The procedure undertaken by the district court to resolve these disputes is ordinary and essential. There is no conflict with any other circuit, or with any state Supreme Court decision. Nor has the Muckleshoot Tribe presented an important question of federal law that has been decided either contrary to the decisions of this Court or in the absence of a decision by this Court. Nothing in the case warrants review by this Court.

A. Background Facts

In 1974, Judge Boldt of the United States District Court for the Western District of Washington entered a judgment adjudicating the treaty-reserved fishing rights of many Indian tribes in Washington State and determining, often in general terms, the waters within which those rights may be exercised. *United States v. Washington*, 384 F. Supp. 312, 359-82 (W.D. Wash. 1974) (hereinafter "Final Decision No. 1" or "Boldt decision"). The primary emphasis at the time of the judgment was on basic treaty-interpretation—whether the tribes were entitled to any allocation of fish, what that allocation should be, and what, if any, authority the State might exercise over tribal fishing. Although the Court made a conscientious effort to delineate "usual and accustomed" fishing areas (hereinafter "U&A") within which each tribe was entitled to exercise treaty rights, many of these findings lacked geographical precision. The court, foreseeing the need for

future determinations, explicitly provided that any party could invoke the continuing jurisdiction of the court in order to determine "whether or not the actions, intended or effected by any party . . . are in conformity with Final Decision No. 1." *Id.* at 419.

Subsequently, there have been numerous sub-proceedings clarifying ambiguities in descriptions of usual and accustomed fishing places.[1] At least four times, the Ninth Circuit has reviewed such determinations.[2] The petitioner, Muckleshoot Tribe, has been a prominent user of this technique to have more specific lines drawn around the fishing areas of other tribes. *See* footnote 2. This case does just that. It more specifically defines Muckleshoot's customary marine fishing areas.

Finding of Fact 76 of Judge Boldt's original decision states that the treaty-time predecessors of the Muckleshoot Indian Tribe fished:

---

[1] *See, e.g.*, "Orders re Herring Fisheries and Determination of Usual and Accustomed Fishing Places of Additional Tribes," 459 F. Supp. 1020, 1048 (W.D. Wash. 1975); "Order re Makah Tribe's Request for Reconsideration of the Lower Elwha Usual and Accustomed Fishing Places," *United States v. Washington*, 459 F. Supp. 1020, 1056; "Findings of Fact and Conclusions of Law re Determination of Additional Usual and Accustomed Fishing Places of Nisqually, Puyallup and Squaxin Island Indian Tribes," *United States v. Washington*, 626 F. Supp. 1405, 1441 (W.D. Wash. 1981); "Order re Makah Tribe's Ocean Fishing Grounds," *United States v. Washington*, 626 F. Supp. 1405, 1466 (W.D. Wash. 1982); "Order Adopting . . . Report . . . re Skokomish Indian Tribe's Request for Determination of Primary Rights at Hood Canal Fishery," *United States v. Washington*, 626 F. Supp. 1405, 1486 (W.D. Wash. 1984).

[2] *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355 (9th Cir. 1998) (*Lummi and Swinomish U&A*); *Muckleshoot Tribe v. Lummi Indian Nation*, 234 F.3d 1099 (9th Cir. 2000) (*Lummi U&A*); *United States v. Lummi Indian Tribe*, 235 F.3d 443 (9th Cir. 2000) (*Lummi U&A*); and the instant case, *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429 (9th Cir. 2000).

> primarily at locations on the upper Puyallup, the Carbon, Stuck, White, Green, Cedar and Black Rivers, the tributaries to these rivers (including Soos Creek, Burns Creek, and Newaukum Creek) and Lake Washington, and *secondarily in the saltwater of Puget Sound.*

384 F. Supp. at 367 (emphasis added).

This did not mean that the Muckleshoot could fish in *all* of Puget Sound. Major portions of Puget Sound were found in the same set of findings to be the usual and accustomed fishing places of other tribes. *See, e.g.*, 384 F. Supp. at 371 (Finding of Fact 99, Puyallup Tribe); at 360 (Finding of Fact 46, Lummi Tribe). After the *Boldt* decision, in the 1970s, Muckleshoot opened commercial fisheries within the rivers listed in the finding, in Lake Washington, and also in the salt water of Elliott Bay, the portion of Puget Sound nearest its reservation known as Area 10A, and in Area 10, a fisheries management area west of Elliott Bay.[3] Muckleshoot did *not* open fisheries in Areas 9 or 11, which are marine fisheries management areas to the north and south of Elliott Bay, reserved to other tribes.[4]

More than 20 years later, the Muckleshoot Tribe announced it would begin fishing in Area 11, an area previously exclusively fished by the Puyallup Tribe. In response to this announcement, the Puyallup Tribe initiated

---

[3] For fisheries management purposes, the State of Washington delineated its waters into numerically identifiable areas. For ease of identification in this matter, with the approval of the District Court, the parties adopted the State's designation of fisheries management areas for geographical reference purposes.

[4] Petitioner claims to have "regularly fished in areas of Puget Sound to its north, west and south." Pet. at 6 (citing *Washington v. Courville*, 676 P.2d 1011 (Wash. Ct. App. 1983)). *Courville* was a state criminal prosecution of three *individual* Muckleshoot Tribal members for gathering shellfish at Redondo Beach in which no tribe participated. The Muckleshoot Tribe did not participate in that activity.

this sub-proceeding under the court's continuing jurisdiction, requesting a determination that Muckleshoot's usual and accustomed areas as set forth in Finding of Fact 76, do not include any marine area outside Elliott Bay. The Puyallup Tribe was subsequently joined by the Suquamish and Swinomish Tribes as plaintiffs, after Muckleshoot representatives expressed an interest in expanding its fisheries north and west of Elliott Bay into Areas 10E and 9.

On cross-motions for summary judgment, after reviewing the portions of the original record submitted by the parties, the district court granted the three plaintiff Tribes' motion. The court found the phrase "secondarily in the salt waters of Puget Sound" ambiguous. Pet. App. 22a. It also found that the evidence in the record overwhelmingly supported an interpretation of Finding of Fact 76 limiting Muckleshoot's marine fisheries to Elliott Bay. Pet. App. 20a-33a. The record showed the Muckleshoot were primarily fresh water fishers, who only rarely fished in that portion of Puget Sound at the mouth of the Duwamish River (namely, Elliott Bay),[5] and then only in connection with shoreline shellfish activities. The district court enjoined Muckleshoot from fishing in Areas 9, 10 and 11. *Id.* at 32a. Specifically, the district court found:

> In light of the other U&As Judge Boldt delineated, it is inconceivable to the court that he would intend to give the Muckleshoot, an upriver people, a vast saltwater U&A stretching from the Tacoma Narrows to Admiralty Inlet and overlapping the U&As of tribes with a documented history of open water fishing in the same areas. The evidence in the record is that the Muckleshoot's predecessors were upriver Indians with

[5] The treaty-time villages of the upriver Muckleshoot Indians were located predominantly in the upper reaches of the Duwamish River drainage. ER 31,47-48, 54, 73. The Duwamish Tribe was situated in the lower reaches of that drainage and on the surrounding salt water bays. ER 47.

> fisheries primarily in the freshwater of the Duwamish drainage who descended to fish at the river's mouth in Elliott Bay. There is no evidence that the Muckleshoot fished in the open marine waters beyond Elliott Bay. Furthermore, there is no evidence that the Muckleshoot possessed the technology to fish on the open waters of Puget Sound.

Id. at 30a.

Muckleshoot appealed this ruling to the Ninth Circuit, which affirmed. Pet. App. 3a-18a. The Court of Appeals held that Finding of Fact 76 must be read in the context of the entire opinion, *id.* at 8a, and in that context it is plainly evident that Muckleshoot was primarily a river fishing tribe, with limited fishing in salt water. The Court concluded that nothing in that opinion (including the evidence in support thereof) supported any usual and accustomed fishing area of the Muckleshoot Tribe beyond the salt water of Elliott Bay. *Id.* at 10a. The Court of Appeals agreed with the district court that

> [T]here is no evidence in the record before Judge Boldt, nor is [the court] persuaded by extra-record evidence, that Judge Boldt intended to describe a saltwater U&A any larger than the open water and shores of Elliott Bay.

Pet. App. 9a.

B. Question Presented For Review

The alleged issue of "*res judicata*" based on the allocation of a "radically narrowed" fishing area "on which the Tribe has relied for twenty-seven years," Pet. at 26, is not supported by the record. The question presented, more properly stated, is:

> Whether the district court under its retained jurisdiction, correctly interpreted its earlier finding of fact establishing the usual and accustomed fishing places of the Muckleshoot Tribe.

This is not an issue that requires review by this Court.

REASONS FOR DENYING THE PETITION

I. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH A DECISION OF ANOTHER UNITED STATES COURT OF APPEALS, NOR HAS IT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A DECISION OF A STATE COURT OF LAST RESORT.

Petitioner does not allege that the decision below conflicts with the decision of any federal court of appeals or state court of last resort, and we know of no such conflict. Nothing could be more local than a district court giving more specific definition to a geographic location described only in its own prior decision, under specifically retained jurisdiction. The Courts below were not directly interpreting a treaty or the Constitution of the United States or an Act of Congress, but only a prior decision by the same district court. There is no reason for this Court to review this case.

II. THE DECISION BELOW DOES NOT WARRANT THE SUPERVISORY JURISDICTION OF THIS COURT.

The Court has stated that it will grant a writ of *certiorari* "only for compelling reasons" such as to review a decision that has "so far departed from accepted and usual course of judicial proceeding . . . as to call for the exercise of this Court's supervisory power." Sup. Ct. R. 10. There is no such departure here.

A. The Phrase "and Secondarily in the Saltwater Of Puget Sound" Required Interpretation To Determine Where Muckleshoot Could Lawfully Fish.

Finding of Fact 76 defines Muckleshoot's usual and accustomed fishing areas as various rivers and a lake and "*secondarily in the saltwater of Puget Sound.*" *United States*

v. Washington, 384 F. Supp. at 367 (emphasis added). Judge Boldt did not say "throughout Puget Sound" and would not have said so, because he typically found the usual and accustomed fishing places of other upriver tribes confined to rivers along which their traditional villages were located. *See, e.g.*, at 376 (Finding of Fact 131); at 379 (Finding of Fact 148).[6] But neither did he say exactly where in Puget Sound Muckleshoot could fish. It is not surprising that this phrase later caused some dispute.

The Court of Appeals has now stated in two sub-proceedings, one brought by the Muckleshoot Tribe itself, that the proper inquiry is not the meaning of individual words, in isolation, but, "what Judge Boldt meant in precise geographic terms by his use of [a particular] phrase." *Muckleshoot Tribe v. Lummi Tribe*, 141 F.3d 1355, 1359 (9th Cir. 1998); *see*, Pet. App. 8a. The Courts below resolved the parties' conflict using the longstanding and uncontroversial rule that the "language of the Court must be read in light of the facts before it." Pet. App. 8a (citing *Julian Petroleum Corp. v. Courtney Petroleum Co.*, 22 F.2d 360, 362 (9th Cir. 1927)); *see also*, *Marshall v. Andrew F. Mahony Co.*, 56 F.2d 74, 78 (9th Cir. 1932). This is particularly appropriate, where, as here, the findings themselves refer to documents in the record of the court.

---

[6] Where Judge Boldt did refer to salt water fishing by these upriver tribes, it was in the context of upriver tribes descending their "home" rivers to their mouths to harvest resources "unavailable in their own territory." *United States v. Washington*, 384 F. Supp. at 376 (Finding of Fact 132); at 368 (Finding of Fact 85). No upriver tribe had usual and accustomed fishing areas in the salt water co-extensive with the widely traveled salt water tribes. Should Muckleshoot succeed in expanding its fishing areas into Areas 9, 10 and 11, its U&A would be more extensive than many salt water tribes. *See, e.g., id.* at 371 (Finding of Fact 96); at 378 (Finding of Fact 141).

Over 100 years ago, in a contract interpretation case, this Court rejected a request to focus on the use of particular words in isolation and required that courts look to the full context in which the words were used. The Court noted the problem that would result if the search were limited to words in isolation: "in order to establish want of ambiguity . . . a few words can be segregated from the entire context, and that, because the words thus set apart are not intrinsically ambiguous, there is no room for construing" the entire document. *O'Brien v. Miller*, 168 U.S. 287, 297 (1897). Similarly, findings of fact must be read as a whole and in context. Pet. App. 8a.

Here, Finding of Fact 76 specifically referred to certain exhibits. The district court and the Ninth Circuit carefully reviewed the record which was before Judge Boldt and gave particular attention to the evidence which was cited in Finding of Fact 76 itself. The Muckleshoot's claim that the Ninth Circuit "proceeded to . . . reject . . . the items cited in Finding of Fact 76," pet. at 8, is incorrect. What the Ninth Circuit rejected was the strained interpretation of this evidence advocated by Muckleshoot—trying to assert a right to fish anywhere in Puget Sound when that was clearly not intended. At the very outset of its analysis of the record, the Court of Appeals stated: "[a]s the district court recognized, the most relevant evidence in determining what Judge Boldt intended by the phrase 'secondarily in the saltwater of Puget Sound' consists of the four documents referenced in Finding of Fact 76." Pet. App. at 9a. Both the district court and the Ninth Circuit gave great weight to those documents. Both courts found the evidentiary record firmly establishes that the treaty-time ancestors of the Muckleshoot Tribe were upriver people, and among those least likely to have engaged in regular fishing throughout all the waters of Puget Sound. Judge Boldt's understanding that Muckleshoot descended to the mouth of the Duwamish river to fish near their regular river fishing grounds did not mean they could fish anywhere

they wanted in Puget Sound and usurp the fishing areas of other Tribes with fisheries in those areas. And, reviewing the record, both courts so found.

B. *Res Judicata* Does Not Bar Resolution Of Ambiguities Within A Judgment

Petitioner relies greatly on arguments concerning *res judicata*. Pet. at 15-29. The purpose underlying the doctrine of *res judicata* is to avoid the social burdens of repetitive litigation and the risk of inconsistent decisions. *Montana v. United States*, 440 U.S. 544, 553-54 (1981). *Res judicata* is an affirmative defense which must be treated with caution because, while it serves important values of repose, it also potentially "blockades unexplored paths that may lead to truth . . . [and] shields the fraud and the cheat as well as the honest person." *Brown v. Felsen*, 442 U.S. 127, 132 (1979). Where, as here, a district court has deliberately retained jurisdiction to determine whether its ruling is being followed correctly, there is no reason to evoke *res judicata*. No court has held that judicial economy is served by shielding a vague portion of a ruling from subsequent interpretation under retained jurisdiction.

III. THE COURT SHOULD NOT GRANT REVIEW FOR THE ADDITIONAL REASON THAT THE PETITIONER IS JUDICIALLY ESTOPPED FROM MAKING ITS PRINCIPAL ARGUMENT.

In a suit to limit the interpretation of the usual and accustomed fishing places of the Lummi Tribe, the Muckleshoot Tribe successfully argued that *res judicata* is inapplicable. *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d at 1359, n.6. In that case, Muckleshoot sought to have the Court of Appeals clarify two U&A findings: Finding of Fact 6 (which marine waters did Judge Boldt intend to include by the phrase "from the Fraser River south to and including Whidbey?"); and Finding of Fact 46 (which marine

waters did he intend to include by the phrase from the Fraser River south to the "present environs of Seattle?"). Lummi argued *res judicata*. The appellate Court held:

> Lummi's assertion that Muckleshoot's partial summary judgment motion is barred by res judicata or the law of the case doctrine is inapposite. Muckleshoot's motion did not propose to relitigate issues finally determined by the decrees but sought only clarification of two findings in *Decision I* and *Decision II*.

Id.

It is particularly disingenuous for the Muckleshoot Tribe to petition this Court to reverse the Ninth Circuit for applying the very rule Muckleshoot successfully established in prior litigation in this same case. More importantly, the doctrine of judicial estoppel bars Muckleshoot from pursuing the opposite side of its *res judicata* argument in this petition. Since the entire petition is based upon an alleged violation of the doctrine of *res judicata*, the entire petition must fail and should therefore be denied.

This Court discussed and applied the doctrine of judicial estoppel last term in *New Hampshire v. Maine*, ___ U.S. ___, 121 S. Ct. 1808 (2001). In that case, the Court held that New Hampshire was equitably barred from asserting a position regarding the boundary between New Hampshire and Maine that was inconsistent with a position it had taken with respect to the boundary in earlier litigation.

In invoking the doctrine of judicial estoppel, this Court observed that:

> [W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

Id. at 1814.

Although the Court explicitly stated that it was not "establish[ing] inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel," *id.* at 1815, the Court listed three factors that should be considered in deciding whether to apply the doctrine: (i) whether "a party's later position must be 'clearly inconsistent' with its earlier position;" (ii) "whether the party has succeeded in persuading a court to accept that party's earlier position;" and (iii) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* (citations omitted). Applying these factors, the Court found that "[h]aving convinced this Court to accept one interpretation of 'Middle of the River,' and having benefitted from that interpretation, New Hampshire now urges an inconsistent interpretation to gain an additional advantage at Maine's expense." *Id.* at 1817. As a result, the Court barred New Hampshire from making that assertion.

The same is true here. Muckleshoot, to diminish Lummi's fishing grounds, successfully argued to the Ninth Circuit that *res judicata* does not bar subsequent proceedings that seek to clarify the geographic scope of Judge Boldt's U&A findings. Muckleshoot, as a defendant and petitioner, now takes a position directly contrary to its previous position. If Muckleshoot were successful, it would gain an unfair advantage by expanding its fishing territory at the expense of other tribes once by arguing *res judicata* is not applicable and now by arguing it is. The doctrine of judicial estoppel bars this type of inequitable outcome.

CONCLUSION

The Petition for a writ of *certiorari* should be denied.

Respectfully submitted,

ANNETTE M. KLAPSTEIN
PUYALLUP INDIAN TRIBE
2002 East 28th Street
Tacoma, Washington 98404
(253) 573-7877

HARRY R. SACHSE *
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY
1250 Eye Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 682-0240

* Counsel of Record

Attorneys for the Puyallup Indian Tribe

August , 2001

MICHELLE HANSEN
SCOTT WHEAT
P.O. Box 498
Suquamish, WA 98392
(360) 598-6295

Attorneys for the Suquamish Indian Tribe

ALIX FOSTER
P.O. Box 817
LaConner, WA 98501
(360) 466-3163

Attorney for Swinomish Indian Tribal Community

MASON D. MORISSET
801 Second Avenue
Suite 1115
Seattle, WA 98104-1509
(206) 386-5200

Attorney for Tulalip Tribes